UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 563

Case No. 595: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 19 March 1991, Shafiuddin Khan, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application containing the following pleas:

"II. PLEAS

I hereby request the Administrative Tribunal:

(a) to review my case on the basis of my earlier submissions made to the Director, DOP [Division of Personnel], UNICEF, New York;

(b) to review my responses not considered properly by UNICEF Administration as well as the ad hoc JDC [Joint Disciplinary Committee] because of a biased approach to the whole case;

(c) to rescind the decision of the UNICEF Executive Director terminating my permanent contract which is based on the recommendations of the ad hoc Joint Disciplinary Committee (JDC) of UNICEF;

(d) to consider my reinstatement to the Organization keeping in view my services and very good performance records with UNICEF for more than 27 years."

Whereas the Respondent filed his answer on 20 November 1991;

Whereas the Applicant filed written observations on 27 January 1992, in which he restated his pleas as follows:

"III. PLEAS

...

1. To overrule the decision of the Executive Director of UNICEF to maintain the contested decision;

2. to reject the conclusion and recommendations of the Administration, the Department of Personnel, and the ad hoc Joint Disciplinary Committee to terminate the Applicant's permanent appointment, and to restore the Applicant to the 'Status quo ante';

a. Reinstatement of the Applicant with effect from 8 February 1991,
b. payment of back salaries retroactive from 8 February 1991, to the present, with interest, if reinstated,
c. payment of salaries retroactive from 8 February 1991, to his sixtieth birthday, if (b) above is not adhered to,
d. compensation for accumulated annual leave from 8 February 1991, to end of pay period or age sixty (60) minimum and accumulated leave before and up to date of contested termination compensation for dependency allowance to age sixty (60) for dependent wife and dependent children,
e. compensation for dependency allowance to age sixty (60) for dependent wife and children,
f. compensation for medical, dental and life insurance from date of separation to age sixty (60),
g. compensation for persons assisting the Applicant in preparation of case to United Nations Administrative Tribunal from 8 February 1991 to present.

3. To compensate the Applicant for wrongful termination,

a. a minimum of eight years salary as compensation for the unjust treatment and the suffering that he has endured as well as to cover for damages caused to the Applicant's family,
b. hardships caused to the Applicant and his family,
c. compensation for damage to the Applicant's reputation,
d. to hold oral hearings on the case and invite the Applicant and counsel."

Whereas, on 15 May 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 14 January 1963, as a locally recruited Secretary at the UNICEF Office in Islamabad, Pakistan. At the time of the events that gave rise to the present proceedings he was serving as Administrative, Finance and Personnel Officer at the P-3 level in the UNICEF Office at Addis Ababa (Ethiopia).

In August 1989, the Applicant travelled on home leave to Pakistan for three months. During that period, the UNICEF Representative in Addis Ababa, discovered that the Applicant, in discharging his functions, had not followed a number of guidelines and procedures established by UNICEF in personnel matters. Also, the Staff Association had complained of certain "irregularities and abuses by [the Applicant] which [had] affected the staff morale". At the Resident Representative's request, the Division of Personnel (DOP) at Headquarters arranged for an investigation to be conducted by the Chief, Personnel Section.

In a memorandum dated 3 October 1989, the UNICEF Resident Representative informed the Applicant of the action he had taken and attached a communication prepared by the Chief, Personnel Section, and himself, containing a description of instances in which the Applicant had allegedly abused his authority and for which he was asked to provide explanations. For example, the Applicant was asked why he had granted a series of short-term and fixed-term appointments without following personnel procedures established by UNICEF, as well as clarifications concerning the travel authorization issued for his wife in connection with her evacuation for medical reasons. In a reply dated 6 November 1989, the Applicant set forth his version of the facts.

In a report dated 2 April 1990, an Internal Auditor informed the Deputy Director, DOP, at Headquarters, of the results of his investigation of the Applicant's conduct and recommended that disciplinary measures be taken against the Applicant. On 5 June 1990, the Director, DOP, transmitted to the Applicant a copy of the Internal Auditor's report on his case, adding that: "Having examined [the] report, its findings point to serious financial and

personnel irregularities committed by you in the performance of your functions as Administrative/Finance and Personnel Officer in Addis Ababa. As the officer responsible for safeguarding and properly monitoring the Organization's financial, personnel and administrative functions, we view such irregularities as constituting serious misconduct." The Applicant was asked to provide his comments on the report and was also informed of his right to avail himself of counsel to assist him in the preparation of his reply. In memoranda dated 15 June and 5 July 1990, addressed to the Director, DOP, the Applicant, commenting on the Internal Auditor's report, denied all the charges against him. He also complained that the late transmission of annexes to the Internal Auditor's report had deprived him of the opportunity to make detailed comments thereon in writing. Moreover, he asserted that as he was absent from Addis Ababa when he received the annexes, he was denied the possibility of access to relevant data and to the assistance of a fellow staff member stationed there.

On 8 October 1990, the Director, DOP, informed the Applicant that the Executive Director had decided to charge him with misconduct and to refer his case to an ad hoc Joint Disciplinary Committee (JDC), to be constituted at Headquarters in accordance with UNICEF administrative instruction CF/AI/1990-05 of 17 September 1990, on Revised Disciplinary Measures and Procedures. In the meantime, in accordance with staff rule 110.2, the Applicant was suspended from the Organization with full pay, pending completion of the investigation.

On 8 October 1990, the Officer-in-Charge, Personnel Policy and Services Section, DOP, informed the Chairperson, ad hoc Joint Disciplinary Committee of the sequence of events that had led to the Executive Director's decision to suspend the Applicant, enumerating the charges against him. He submitted a detailed statement of facts, with supporting documentation and stated that "it [was] the position of the Administration that the facts and findings contained [in his communication] reveal, beyond reasonable doubt, that the [Applicant] abused his authority for his personal advantage ... and committed personnel and financial improprieties" during the exercise of his functions as Administrative, Finance and Personnel Officer in Addis Ababa. The ad hoc JDC's advice was accordingly sought on what disciplinary measures, if any, should be taken against the Applicant.

According to the record of the case, the Applicant did not make any further response to the Statement of Charges.

The ad hoc JDC adopted its report on 4 February 1991. Its conclusion and recommendation read as follows:

"Conclusion

The ad hoc JDC makes seven (7) separate statements in its Report with regard to the allegations the Administration makes against Mr. Khan. These points cover personnel issues, financial issues and internal control procedures. Taken individually each of the allegations the ad hoc JDC addresses and comments on are deemed contraventions of UNICEF rules, regulations and procedures of varying severity. However, taken collectively, and viewed as a whole, they depict a systematic abuse of position and authority in all areas for which Mr. Khan was responsible - Administration, Finance and Personnel. The ad hoc JDC therefore feels that in regard to the areas it addresses in its Report the Administration's case against Mr. Khan has validity.

Recommendation

In view of our conclusions, as indicated above, based on due consideration of the allegations by the Administration and of Mr. Shafiuddin Khan's previous responses, we unanimously recommend that Mr. Khan be separated from the Organization without notice or compensation in lieu thereof."

On 8 February 1991, the Executive Director transmitted to the Applicant the ad hoc JDC's report, stating, inter alia:

"...

Having considered all the facts and findings presented in the JDC Report, I have concluded that you abused your authority for your personal advantage/benefit and committed the personnel and financial improprieties noted by the JDC, during your tenure as Administrative/Finance/Personnel Officer in Addis Ababa. The Organization views very seriously such improprieties, as you were, by virtue of your official position, the custodian of all personnel and financial matters.

I have therefore decided to endorse the recommendation of the JDC that you be separated from service as a disciplinary measure under staff rule 110.3(a). However, I have decided that you be paid compensation of three months salary in lieu of notice, as provided in staff rule 109.3.

> The effective date of your separation will be the c.o.b. [close of business] on which you receive this letter. We are requesting, under separate cover, the Islamabad Office to hand deliver this sealed letter to you, and to advise us of the date of its receipt."

On 19 March 1991, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment was motivated by prejudice.

2. The Respondent did not take into account the Applicant's 26 years of untarnished service.

3. The penalty imposed upon the Applicant was unduly harsh and was not commensurate with the offence.

Whereas the Respondent's principal contentions are:

1. The decision to separate the Applicant from the Organization was properly motivated.

2. The proceedings leading to the decision of separation were in compliance with UNICEF Policies, Procedures and Instructions, and fully respected the Applicant's right to due process.

The Tribunal, having deliberated from 15 June to 2 July 1992, now pronounces the following judgement:

I. The Applicant has put forward two sets of pleas: the second set, included in the Applicant's written observations to the Respondent's answer, is more elaborate, but the Tribunal finds that in substance the two sets do not differ much. The principal request of the Applicant is that the Tribunal, after reviewing his case, should order the rescission of the decision of the Executive Director to terminate the Applicant's services with UNICEF and grant financial compensation to the Applicant for injuries he claims to have suffered.

II. In disciplinary cases, the Tribunal's jurisprudence has consistently accepted that the Respondent has broad discretionary authority, provided his

decisions are taken under the prescribed procedure, in accordance with due process and are not tainted by bias, prejudice or other extraneous factors.

III. The Applicant asserts in several places that, in deciding to separate him from UNICEF, the Respondent did not extend to him the protection of the Staff Regulations and Rules and that he was systematically a victim of bias and prejudice. To quote from his written observations, the Applicant states that he "worked tirelessly for ... 26 years without being charged with any improprieties ... until the orchestrated charges were brought against him while he was on home leave from his duty station and could not defend himself."

IV. In view of these allegations, the Tribunal examined the evidence to determine (a) if any irregularities in procedure had been committed and (b) if at any stage or in any manner the conclusions or decisions of the Respondent had been vitiated or influenced by bias, prejudice or other extraneous factors, such as conspiracy.

V. The Applicant went on leave on 18 August 1989, for three months, and on 3 October 1989, the UNICEF Representative in Addis Ababa sent a letter to the Applicant (marked "on return from leave"), asking for his explanations and clarifications on various personnel matters reported to the Representative. The Applicant returned from leave on 28 October 1989, and on 6 November 1989, he sent his reply, containing his explanations and clarifications. The reply given by the Applicant was apparently sent to Headquarters and on 15 February 1990, the Deputy Director, Division of Personnel conveyed to the Officer-in-Charge at Addis Ababa (the UNICEF Representative had left by then) the views of the Division of Personnel on the numerous allegations against the Applicant, together with his replies. The Applicant made no complaint about the procedure followed, though he rejected all charges of wrong-doing and gave his version of what happened in respect of the various incidents brought to his notice in the letter of 3 October 1989. The Applicant added, however, in his reply of 6 November 1989, a postscript which read, "In future may I reiterate that audit/evaluation on the performance of any staff member should be carried out in his/her presence and not absence. In my 26 years with UNICEF it happened for the first time."

The Tribunal finds nothing irregular in these early attempts to discover the facts about the various allegations.

VI. Meanwhile, the Internal Auditors submitted on 2 April 1990, their report on the personnel issues relating to the Applicant's case. The Director, Division of Personnel (DOP), asked the Applicant on 5 June 1990, for his comments and warned him that "we are considering submitting your case to the Joint Disciplinary Committee." The Applicant, in his comments sent on 15 June 1990, said that he was "grateful to you" (the Director, DOP) "for giving me an opportunity to defend against certain allegations made by the Internal Auditor", and he concluded: "Based upon the facts given above, I leave it to you to judge my performance keeping in view my conduct, behaviour and performance...". There is no suggestion, in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed.

VII. The next stage was reached on 8 October 1990, when the Director, DOP, referred 15 or more charges against the Applicant to the ad hoc Joint Disciplinary Committee with the following concluding words:

> "It is the position of the Administration that the facts and findings contained herein reveal, beyond reasonable doubt, that the Administrative/Finance/Personnel Officer [AFPO] abused his authority for his personal advantage/benefit and committed personnel and financial improprieties during his tenure in Addis Ababa. The Organization views very seriously such improprieties by the AFPO who is, by virtue of his official position, the custodian of all personnel and financial matters. In view of the foregoing and in conformity with staff rule 110.4, the ad hoc JDC is requested to advise the Executive Director as to what disciplinary measures, if any, should be taken in this case."

VIII. At the same time, the Director, DOP, informed the Applicant of his right to submit written observations, to seek advice of counsel, adding:

> "You may suggest other persons of whom inquiry might be made and to request that hearings be held and witnesses called: the ad hoc JDC shall decide if these suggestions or requests are warranted;
>
> To enable you to prepare your response, you may avail yourself of the facilities of the office in Islamabad. Also, you may use any of the communication facilities in the office to

> communicate with [the Coordinator of the Panel of Counsel],if you wish representation by Counsel. In the event you decide to have such representation, we will make available to him/her any relevant documentation on your case.
>
> In accordance with staff rule 110.2, you are suspended with full pay pending the completion of your case."

IX. The Tribunal notes that the Applicant took no action on any of these points and the ad hoc JDC's report stated, inter alia, that "Mr. Shafiuddin Khan has chosen not to respond to the summary of [the] Administration's case" and therefore "in fairness to the staff member", the ad hoc JDC considered the Applicant's submissions to the UNICEF Representative and to the Director, Division of Personnel, "as the basis of his defence to the allegations of the Administration". The Tribunal is not aware of the reasons for the Applicant's attitude towards the ad hoc JDC and notes in this connexion the ad hoc JDC's statement that "some points made by the Administration have not been addressed ... because the ad hoc JDC deemed them either not significant enough or lacking clear relevance to merit further consideration." The Tribunal considers these statements as indicative of the ad hoc JDC's exercise of its own discretion and judgement and of its desire to be as fair to the Applicant as possible in the circumstances. The Tribunal finds that the Applicant was given reasonable time and offered the facilities to which he was entitled to respond before the ad hoc JDC to the accusations against him, but that he decided not to avail himself of them.

X. Taking into account all the measures adopted in examining and deciding the allegations and charges against the Applicant at different stages, the Tribunal concludes that the relevant regulations and rules, as well as the requirements of due process, were correctly observed.

XI. The Applicant has presented a tangled web of innuendos, insinuations and accusations of prejudice and intrigue against the Respondent, and the Tribunal has examined those charges it can identify. In general terms, the Applicant has expressed his grievances (included in his written observations, which the Applicant labels as "responses", filed on 27 January 1992) that the UNICEF Representative drew up his first list of several allegations of wrong-doing on 6 October 1989, when the Applicant was away on leave. The

Tribunal notes that the list was given to the Applicant after his return to Addis Ababa and he replied to it on 6 November 1989. In the circumstances, the Tribunal cannot hold that his absence from Addis Ababa when the UNICEF Representative wrote, but did not deliver, his letter of 6 October, affected the Applicant's interests adversely.

XII. The other general accusation he makes, also in his written observations of 27 January 1992, is that he was "asked to supply information three (3) times to substantiate allegations, knowing full well that the Administration and DOP decided to bring charges against him for improprieties". There is no evidence substantiating this accusation of impropriety.

XIII. The Applicant complains that on the last page of his performance evaluation report for the period 1 January 1989 to 31 December 1989 (his last report before his separation from UNICEF), the comments made on 22 February 1990, by his Second Reporting Officer, "were not made known to the Applicant for his rebuttal". However, the Tribunal notes that the Applicant counter-signed this report on 1 March 1990, and indeed referred to it in his application of 19 March 1990, but had taken no action to rebut or refute such adverse comments as he found in it.

XIV. In his explanation and clarification of 6 November 1989, the Applicant stated, inter alia, "I am a little perturbed that an audit/evaluation of my performance was carried out by [the Chief, Personnel Section] in my absence", but a little later he added: "I fully revere the competence and knowledge of [the Chief, Personnel Section] in personnel matters and regard him as my teacher". In the circumstances, the Tribunal cannot find that the Chief, Personnel Section's enquiry into the complaints against the Applicant was in any way biased.

XV. Finally, the Applicant complains that he did not have any opportunity to challenge the composition of the ad hoc JDC. Apart from there being no provision for such a challenge, the Tribunal considers that he could nonetheless have conveyed his objection to the Personnel Department if he wished to, but he did not do so.

XVI. Besides these complaints, which the Applicant tends to believe prove bias or prejudice or conspiracy, in his application, the Applicant also expresses a suspicion concerning a Personnel Officer who might have nursed a grudge against him for some incident that took place nearly 10 years ago. The Tribunal cannot but reject such a far-fetched speculation and will not therefore entertain the Applicant's request for any document relative to this suspicion. Similarly, his complaint that no reference has been made to the "Statement of [the Applicant] on petty cash transactions", prepared by a staff member of UNICEF at Addis Ababa in 1990, has, in the opinion of the Tribunal, no substance. In any event, this statement was available to reviewing authorities which dealt with this case at different times and stages.

The only indication of personal friction the Tribunal can trace in this voluminous case relates to some unpleasant altercation between the Applicant and the Internal Auditor. However, neither one nor the other allowed this exchange to get in the way of his work, and the Tribunal finds nothing in the Internal Auditor's report of 2 April 1990, that could be considered as arising from spite or a grudge. In any event, this report, as all the others, was subjected to repeated scrutiny by the Department of Personnel, the ad hoc JDC and finally by the Executive Director.

XVII. As a result of its examination, the Tribunal is satisfied that the decision of the Respondent to separate the Applicant from the service of UNICEF was not tainted in any manner.

XVIII. On the merits of the findings of the ad hoc JDC and of the Respondent's decision thereon, the Applicant makes a number of points. After maintaining his claims of complete innocence of all the charges, the Applicant says that his long and valuable service with UNICEF, totally untarnished and often appreciated, was not taken into account by the various investigating authorities. The Tribunal finds, on the other hand, that both the Director, DOP, and the Executive Director carefully reviewed the case, especially the Applicant's memoranda of June and July 1989, containing his version of the events and his comments, before deciding on the Applicant's termination. The other bodies dealing with the case had also carefully examined the specific charges. The Tribunal notes that a past record of good service may become

irrelevant if specific charges of wrong-doing are proved. At any rate, these charges involving massive documentation and much detail, were, the Tribunal concludes, fully and correctly investigated. The Tribunal would, following its jurisprudence, not substitute its own judgement for the findings of the ad hoc JDC or for the decision of the Respondent in the absence of any flawed procedure, lack of due process, the existence of prejudice or of other extraneous factors.

XIX. The ad hoc JDC made seven statements, all pointing to the culpability of the Applicant, and concluded that, taken together, they constituted sufficient ground for recommending separation of the Applicant from UNICEF. The Tribunal does not find any irregularity or inconsistency in that.

XX. The Applicant also contends that the severity of the punishment - separation - is not justified, that the principle of first offence has not been applied and that in many respects the Declaration of Human Rights has not been observed. The Tribunal has already indicated the broad discretionary power of the Respondent in disciplinary cases, which it finds to have been properly exercised in this case.

XXI. The Tribunal, therefore rejects the application.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Ioan Voicu
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary